UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

INTERNATIONAL UNION OF OPERATING ENGINEERS,
LOCAL 18

Respondent; and

NERONE & SONS, INC. 08-CD-135243
R.G. SMITH COMPANY, INC.
KMU TRUCKING & EXCAVATING
SCHIRMER CONSTRUCTION CO.
PLATFORM CEMENT
21st CENTURY CONCRETE CONSTRUCTION, INC.
INDEPENDENCE EXCAVATING, INC.

Charging Parties; and

LABORERS' INTERNATIONAL UNION OF NORTH
AMERICA, LOCAL 310

Party-In-Interest.

RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS

Pursuant to Section 102.46(a) of the Board's Rules and Regulations, Respondent International Union of Operating Engineers, Local 18 hereby submits its Brief in Support of Exceptions to Administrative Law Judge David I. Goldman's August 1, 2016 Decision and May 4, 2016 Amended Order Granting Charging Parties' Motion in Limine in the present matter.

Respectfully Submitted,

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BRIEF IN SUPPORT OF EXCEPTIONS

I. Introduction

The gravamen of the instant dispute is whether the International Union of Operating Engineers, Local 18's ("Local 18" or "Union") continual maintenance of grievances, despite adverse work awards by the National Labor Relations Board pursuant to Section 10(k) of the National Labor Relations Act, constitutes lawful work preservation activity. In his Decision, Administrative Law Judge Davis I. Goldman rejected Local 18's affirmative defenses of work preservation and collusion, concluding that the Union had violated Section 8(b)(4)(D) of the Act. The ALJ's ruling, however, is fundamentally flawed in its selection of purportedly dispositive Board precedent, determination of the relevant facts, and the application of those facts to the law.[1]

At the outset, the ALJ incorrectly held that the underlying Section 10(k) proceedings in this matter are, for all practical purposes, binding as to both the material facts and dispositive law of the present matter. However, Section 10(k) proceedings by their very nature are unable to properly evaluate and apply affirmative defenses because such an examination necessarily requires an adjudication that weighs the evidence through credibility assessments, which is unavailable in a purely investigatory Section 10(k) hearing. As such, the ALJ summarily disposed of Local 18's collusion defense. However, if he had properly considered it, a preponderance of the evidence would have demonstrated that the Laborers' International Union of North America, Local 310 ("LIUNA 310"), Laborers' International Union of North America, the Construction Employers Association ("CEA"), and the Charging Parties are instead attempting to manipulate the provisions of the National Labor Relations Act in order to use

[1] Local 18 also excepts to ALJ Goldman's Amended Order Granting Charging Parties' Motion in Limine, as well as his ruling denying Local 18's Motion to Reopen the Record. These rulings are part and parcel of his overall Decision and are therefore considered holistically with the entirety of Local 18's arguments in this Brief.

Section 10(k) proceedings as a tool to bypass the duly negotiated work preservation clause contained within Local 18's collective bargaining agreements.

Moreover, to the extent that ALJ Goldman even considered Local 18's work preservation affirmative defense, he relied on faulty Board precedent. Proper Board jurisprudence that exists within the aegis of Section 8(b)(4) cases requires an finding of the applicable bargaining unit before the Board assesses whether the union asserting work preservation has in fact historically performed such work through its members, or that such work is fairly claimable by the same. The ALJ instead utilized a misbegotten line of authorities that do not consider whatsoever the scope of the bargaining unit before assessing the merits of the work preservation defense. If he had done otherwise, a preponderance of the evidence would have established that within the appropriate multiemployer bargaining unit, forklift and skid-steer work is fairly claimable by Local 18 members in the present matter. At bottom, Local 18's conduct through enforcement of its work preservation grievances does not violate Section 8(b)(4)(D) of the Act. Accordingly, the General Counsel's Complaint must be dismissed in its entirety.

II. Facts Relevant to Exceptions

A. International Union of Operating Engineers, Local 18

For over seventy years, Local 18 has represented the interests of construction equipment operators ("operating engineers" or "Local 18 members") working in 85 of Ohio's 88 counties along with four counties in Northern Kentucky. As the name implies, operating engineers are the men and women responsible for operating the equipment, machinery, and technology utilized in the building and construction industry. Like many labor organizations representing employees in the building and construction industry, Local 18 negotiates Section "8(f)" or "pre-hire" collective bargaining agreements ("CBAs") with building and construction employers. Employers engaged

in the building and construction industry often elect to negotiate, adopt, and maintain pre-hire agreements through a multiemployer trade association. Presently, Local 18 negotiates CBAs with two separate multiemployer trade associations representing construction employers engaged in the building construction industry: the Associated General Contractors ("AGC") and the CEA. (*E.g., Donley's IV*: L18 Ex. 178A; L18 Ex. 178B.)

B. The CEA and the CEA Agreement

The CEA Agreement represents three decades of collective bargaining history between Local 18 and a conglomerate of building construction employers working in and around Cleveland, Ohio, that negotiate through the CEA. (*Donley's IV*: GC Ex. 5.) Of specific importance to the present matter, the CEA Agreement has for decades unambiguously identified the relevant bargaining unit, specified the work jurisdiction afforded to operating engineers within that unit, and provided for the preservation of that bargaining unit work. In sum, the CEA Agreement functions as a system of industrial self-government utilizing agreed-upon rules of law which seeks to avoid leaving "matters subject to a temporary resolution dependent solely upon the relative strength, at any given moment, of the contending forces." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580-81, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960) ("*Warrior & Gulf*").

The CEA Agreement specifies the relevant bargaining unit by identifying: the geographic jurisdiction covered by the agreement; the type of work covered by the agreement; the identity of the employers covered by the agreement; the identity of employees covered by the agreement, and the type of work performed by those employees. (*Donley's IV*: L18 Ex. 178B.) Taken as a whole, these provisions provide a comprehensive framework that identifies the relevant bargaining unit as a multiemployer bargaining unit encompassing all building construction

employers working within a specific geographic region that have voluntarily bound themselves to the CEA Agreement.

In terms of the geographic region, the CEA Agreement applies to the "employment of and conditions under which employees shall work and rates of pay they shall receive on work in "Building Construction" within the following Ohio counties: Ashtabula, Erie, Huron, Lorain, Cuyahoga, Geauga, Lake, and Medina counties. (*Donley's IV*: GC Ex. 5, Article I.). With respect to the type of work performed under the CEA Agreement in that geographic area, the term "Building Construction" is defined to compose "the erection and construction of building structures, including modifications thereof, or additions or repairs thereto intended for use for shelter, protection, comfort or convenience and demolition of same. Building Construction shall also include the excavation and foundations for Building Construction." (*Id.*) The term "Building Construction" is further defined by the CEA Agreement to include specific forms and types of construction projects including "Industrial and Building Site"; "Power Plant, all Wind Generation Devices and all supporting infrastructure (underground and roadway), Solar Farm, Geo Thermal Site, Amusement Park, Athletic Stadium Site"; and "Sewage Plant, Waste Plant and Water Treatment Facilities Construction." (*Id.*)

Like many agreements negotiated under Section 8(f), the CEA Agreement contains a mutual recognition clause. (*Donley's IV*: GC Ex. 5, Article II.) Pursuant to this clause, the CEA is specifically recognized as the "exclusive collective bargaining agent for all Employers of the Operating Engineers" within the counties covered by the Agreement. (Id.) As to the identity of employers bound by the CEA Agreement, Article II, Paragraph 6 identifies such as being "[a]ll members of the Association for whom it holds bargaining rights and any person, firm, or corporation who, as an Employer, become signatory to this Agreement, shall be bound by all of

its terms and conditions, as well as any future amendments which may be negotiated between the Association, and the Union[.]" (*Id*.) Such employers "shall be bound to make Health and Welfare payments, Pension payments Apprenticeship fund payments . . . or any other payment established by the appropriate Agreement." (*Id*.) Moreover, the CEA recognizes Local 18 as the "exclusive bargaining agent for all Operating Engineers" within the Agreement's geographical confines. (*Id*.) In this manner, the CEA Agreement clearly and unambiguously identifies the bargaining unit as a multiemployer bargaining unit composing any building construction employer that has either signed the CEA Agreement or has assigned its bargaining rights to the CEA.

The CEA Agreement also clearly and unambiguously identifies the work jurisdiction afforded to operating engineers. Specifically, Article II, Paragraph 10 provides a comprehensive list of construction equipment that is specifically identified as being within the contractual jurisdiction of Local 18. (*Donley's IV*: GC Ex. 5.) Pursuant to this section, Local 18's contractually mandated work jurisdiction includes "Forklifts, Skidsteers, and all like equipment as described in paragraphs 49, 50, and 51 of this agreement and within the jurisdiction as assigned to the Union by the American Federation of Labor." (*Id.*) (Emphasis added.) In referencing Paragraphs 49, 50, and 51, the work jurisdiction allotted to Local 18 under Paragraph 10 of the CEA Agreement extends to include additional equipment specifically identified in the CEA Agreement's wage, pay, and classification index. (*Id*.) Included among the multitude of equipment listed in Paragraphs 49, 50, and 51 are, *inter alia,* forklifts and skid-steers. (*Id*.)

In conscious recognition of the temptation that employers often face to embrace profit motives over contractual obligations, the CEA Agreement is crafted so as to discourage, if not outright avoid, instances where a signatory employer assigns the operation of equipment within

Local 18's contractually negotiated work jurisdiction to someone other than an operating engineer. Under Paragraph 20, employers that elect to bind themselves to the CEA Agreement explicitly agree "that the work jurisdiction of the Operating Engineers, as assigned by the AFL-CIO, will be respected and all Operating Engineer work will be performed by an Operating Engineer[.]" (*Donley's IV*: GC Ex. 5.) In order to provide substance to this obligation, Paragraph 21(E) of the CEA Agreement states that "[i]f the Employer assigns any piece of equipment to someone other than the Operating Engineer, the Employer's penalty shall be to pay the first qualified registered applicant the applicable wages and fringe benefits from the first day of the violation. (*Id*.) In this manner, while the CEA Agreement's work preservation clauses explicitly allows a signatory employer to assign work as it sees fit, it simultaneously creates an economic disincentive for a signatory employer to disregard Local 18's contractually-mandated craft jurisdiction.

C. The AGC and the AGC Agreement

The AGC is a multiemployer trade association representing building construction employers across Ohio and parts of Kentucky. (*Donley's IV*: Tr. 49-50.) As such, the AGC has, for decades, negotiated a continuous series of CBAs with Local 18 commonly referred to by the parties as the "AGC Agreement." (*Id*. at L18 Ex. 179.) It bears noting that Local 18's bargaining relationship with the AGC actually predates the Union's relationship with the CEA and, prior to the creation of the CEA, the AGC's geographic jurisdiction specifically included the counties of Ashtabula, Erie, Huron, Lorain, Cuyahoga, Geauga, Lake, and Medina. (*Id*. at L18 Ex. 178A.)

In most respects, the relevant provisions of AGC Agreement mirror those contained in the CEA Agreement. By its own terms, the AGC Agreement specifically identifies the relevant bargaining unit as a multiemployer unit composing all employers that have elected to bind

themselves to the AGC Agreement. (*Donley's IV*: L18 Ex. 179.) To this end, the AGC Agreement contains provisions specifically identifying the geographic jurisdiction covered by the agreement, the type of work covered by the agreement, the identity of the employers covered by the agreement, and the identity of employees covered by the agreement. (*Id*.) More importantly, the AGC Agreement explicitly states that the employers bound to the agreement intend to become part of a "single multi-employer collective bargaining unit." (*Id.* at Article II.) Taken as a whole, these provisions clearly provide for a multiemployer bargaining unit encompassing all building construction employers bound to the AGC Agreement.

In terms of geographic scope, the AGC Agreement states that its terms apply to the "employment of and conditions under which employees shall work and rates of pay they shall receive on work in Building Construction in all counties in the State of Ohio except Ashtabula, Cuyahoga, Geauga, Lake, Columbiana, Mahoning and Trumbull, and including Boone, Campbell, Kenton and Pendleton counties in Kentucky. (*Donley's IV*: L18 Ex. 179, Article I.) The term "Building Construction" is defined to compose "the erection and construction of building structures, including modifications thereof, or additions or repairs thereto intended for use for shelter, protection, comfort or convenience and demolition of same. Building Construction shall also include the excavation and foundations for Building Construction." (*Id*.) The AGC Agreement also defines the term "Building Construction" to also include specific forms and types of construction projects including "Industrial and Building Site"; "Power Plant, all Wind Generation Devices and all supporting infrastructure (underground and roadway), Solar Farm, Geo Thermal Site, Amusement Park, Athletic Stadium Site"; and "Sewage Plant, Waste Plant and Water Treatment Facilities Construction." (*Id*.)

The AGC Agreement contains a mutual recognition clause that specifically recognizes the Association as the "exclusive collective bargaining agent for all Employers of the Operating Engineers" within the relevant counties. (*Donley's IV*: L18 Ex. 179, Article II.) The AGC Agreement's mutual recognition clause further states that the term "Employer" and/or "Employers" means "persons, firms, corporations, joint ventures or other business entities bound by the terms of this Agreement[.]" (*Id*.) Immediately thereafter, the recognition clause specifically states that the "Employers and the Union by entering into this Agreement intend to and agree to establish a single multi-employer collective bargaining unit. Any Employer who becomes a party to this Agreement shall thereby become a member of the multi-employer collective bargaining unit established by this Agreement." (*Id*.) In sum, the terms and provisions contained within the AGC's mutual recognition clause clearly and unambiguously identify the bargaining unit as a multi-employer bargaining unit composing any building construction employer that has bound itself to the AGC Agreement. The AGC Agreement's mutual recognition clause also specifically recognizes the Union as the "exclusive collective bargaining agent for all Operating Engineers" within the counties covered by the AGC Agreement. (*Id*. at L18 Ex. 179, Article II.)

The AGC Agreement also clearly and unambiguously identifies the jurisdiction of work afforded to operating engineers within the bargaining unit. Specifically, Article II, Paragraph 10 provides "that all equipment for which classifications and wages have been established in this Agreement, and including that equipment for which classifications and wage rates may hereafter be established, shall be manned, when operated on the job site, by a member of the International Union of Operating Engineers, and paid the rates as specified in this Agreement." (*Donley's IV*: L18 Ex. 179.) By referencing "all equipment for which classifications and wages have been

established in this Agreement," the work jurisdiction allotted to Local 18 under Paragraph 10 is extended to include additional equipment specifically identified in the wage, pay, and classification provisions found in Article V, Article VI, and Exhibit A of the AGC Agreement. Included among the myriad of equipment listed in Article V, Article VI, and Exhibit A of the AGC Agreement are, *inter alia*, forklifts and skid-steers. (*Id*.)

Much like its agreement with the CEA, Local 18's agreement with the AGC also contains specific provisions designed to preserve and protect the scope of work contractually afforded to Local 18 members under the AGC Agreement. (*Donley's IV*: L18 Ex. 179, Article II.) Once again, the work preservation clause contained within the AGC is crafted so as to discourage, if not outright avoid, instances where an employer assigns the operation of equipment within Local 18's contractually negotiated work jurisdiction to someone other than an operating engineer. (*Id*.) Again, the deterrent to such behavior as agreed upon in the AGC Agreement is the imposition of an economic penalty. Specifically, under Paragraph 20, employers that elect to bind themselves to the AGC Agreement explicitly agree "that the work jurisdiction of the Operating Engineers, as assigned by the AFL-CIO, will be respected and all Operating Engineer work will be performed by an Operating Engineer[.]" (*Id*.) In order to provide substance to this obligation, Paragraph 22 mandates a specific economic sanction: "[i]f an Employer violates Paragraph 20, the Employer's penalty shall be to pay the first qualified registered applicant the applicable wage and fringe benefits from the first day of the violation." (*Id*. at L18 Ex. 179, Article II.) As such, employers bound to the AGC Agreement are not prohibited from assigning work covered by the AGC Agreement to someone other than an operating engineer. Rather, the AGC Agreement's work preservation clauses explicitly allows a signatory employer to assign work as it sees fit so long as that employer is willing to pay any damages required under the terms of the parties' agreement.

D. Local 18's Work Preservation Grievances

Despite the clear terms of the relevant CBAs and Local 18's established history of performing forklift and skid-steer work, there have been past instances wherein a contractor – including, but not limited to certain of the Charging Parties – that employs individuals belonging to the CEA and/or AGC multiemployer bargaining unit, assigns equipment to someone other than an operating engineer. In such instances, the Union has a demonstrated history of resolving the dispute through the use of governing contract's grievance and arbitration provision.

For example, in June of 2008, Local 18 documented an instance wherein Rudolph Libbe Co. elected to assign the operation of a forklift to someone other than an operating engineer. (*Donley's IV*: L18 Ex. 86F.) In response, Local 18 filed a written grievance with the employer that sought damages for the breach. Thereafter, the matter was settled when Rudolph Libbe Co. agreed to pay a penalty in the form of a charitable donation the Hospice of Northwest Ohio. (*Donley's IV*: Tr. 2267.) Notably, the Rudolph Libbe Co. has long been signatory to both the AGC Agreement and the CEA Agreement. Indeed, according to the records kept by both the Union and the CEA, Rudolph Libbe has repeatedly assigned it bargaining rights to the CEA. (*Id*. at L18 Ex. 171C; L18 Ex. 188 at p. 7.) Rudolph Libbe has also repeatedly bound itself to the AGC Agreement. (*Id*. L18 Ex. 175B; L18 Ex. 174M.)

Similarly, in June of 2009, Local 18 documented an instance wherein G&L Corp. elected to assign the operation of a forklift to someone other than an operating engineer. (*Donley's IV*: L18 Ex. 86G.) At the time of this breach, G&L Corp. was signatory to an AGC Book Agreement. (*Id*. at L18 Ex. 174A.) Once again, the Union responded to this breach by filing a written grievance under the AGC Agreement and once again the matter was resolved after the

parties negotiated a settlement whereby G&L Corp. agreed to pay a penalty in the form of a charitable donation; *to wit*, $204.00 to the Vera Bradley Foundation. (*Id*. at Tr. 2272.)

At bottom, the vast majority of contractors that have received a forklift and/or skid-steer work preservation grievances from Local 18 have agreed to a negotiated settlement that included the payment of monetary damages. (*Donley's IV*: L18 Ex. 41B, 85A, 85B, 85C, 85D, 85E, 85F, 85G, 86B(2), 86C, 86D, 86E; Tr. 1211-13, 1878-80, 1881-92, 1928-29, 2249-50, 2255-58, 2262-65.) These employers included Bogner Construction Co. (AGC multi-employer bargaining unit, *Donley's IV*: L18 Ex. 172A), Mr. Excavator, Inc. (CEA multi-employer bargaining unit, *Id*. at G.C. Ex. 20A), Phoenix Cement, Inc. (CEA multi-employer bargaining unit, *Id*. at L18 Ex. 171C), Mosser Construction (CEA and AGC multi-employer bargaining units, *Id*. at L18 Ex. 171F, 174L, 175F, 188) Site-Tech, Inc. (CEA multi-employer bargaining unit, *Id*. at L18 Ex. 171A), Industrial Power Systems (AGC multi-employer bargaining unit, *Id*. at L18 Ex. 173A, 174I), and Sofco Erectors, Inc. (AGC multi-employer bargaining unit, *Id*. at L18 Ex. 173B, 173E.)

Of particular note, on July 19, 2012, Local 18 Business Agent Michael Cramer documented an instance wherein Charging Party R.G. Smith Co.[2] elected to assign the operation of a forklift to someone other than an operating engineer. (*Donley's IV*: L18 Ex. 86A.) Based upon the location of the job, Mr. Cramer filed a grievance alleging a violation of the AGC's work preservation provisions. (*Id*. at L18 Ex. 86A, Tr. 2250-55.) Thereafter, the matter was resolved when the employer agreed to pay a penalty in the form of $1,245.00 donation to Rainbow Babies & Children's Hospital. (*Id*.)

[2] According to the Union's internal records, R.G. Smith Co. was signatory to the AGC Agreement that expired in 2013 (*Donley's IV*: L18 Ex. 173E) and is currently signatory to the AGC Agreement not set to expire until 2017. (*Id*. at L18 Ex. 172B.) The Union's internal records indicate that R.G. Smith was bound to the CEA Agreement that expired in 2012. (*Id*. at L18. Ex. 171F.) Similarly, the CEA's own internal records indicate that R.G. Smith assigned its bargaining rights to the CEA in both 2011 and 2012. (*Id*. at L18 Ex. 188, p. 6.)

Likewise, in March of 2013, Local 18 discovered an instance wherein *Donley's II* Charging Party B&B Wrecking elected to assign the operation of a forklift to someone other than an operating engineer. (*Donley's IV*: Tr. 592-93; L18 Ex. 86.) At this time, B&B Wrecking was signatory to the AGC Agreement. (*Id.* at Tr. 591-92.) Accordingly, Local 18 filed a grievance with B&B alleging that by electing to assign construction equipment that is properly within the contractually mandated craft jurisdiction of Local 18's membership to someone other than an operating engineer, B&B was in breach of the AGC Agreement's work preservation clause and was contractually required to pay damages to the first qualified registered applicant in the amount of all applicable wages and fringe benefits from the first day of the violation. (*Id*. at L18 Ex. 86; Tr. 591-95.) Shortly thereafter, the grievance was settled after B&B agreed to pay damages to the first qualified applicant in the Union's hiring hall. (*Id*. at L18 Ex. 86; Tr. 591-95.)

E. Local 18's History of Performing the Work in Dispute

The evidence presented in the present matter offers dispositive proof that Local 18's members have a long and proud history performing the work in dispute. Decades of collective bargaining, thousands of pages of documents, and scores of witness testimonials render it an immutable fact that Local 18 members have long operated forklifts and skid-steers for employers performing work under the AGC and/or CEA Agreements. More pointedly, this evidence also demonstrates that Local 18 members have performed this work for employers that are parties to the present dispute and that those same members lost their employment when the work at issue was assigned to employees represented by the laborers.

i. Collective Bargaining History

The CEA Agreement has long identified both forklifts and skid-steers as being properly within the work jurisdiction afforded to operating engineers, since its inception in 1985. Over the

course of decades, Local 18 and the CEA have repeatedly negotiated for various new and amended contracts and, during each these negotiations, have repeatedly expanded the definition of and reference to both pieces of equipment. To this point, in 2009, Paragraph 10 of the CEA Agreement – which identifies Local 18 craft jurisdiction – was modified to include specific reference to both forklifts and skid-steers. Ultimately, the historical consistency and modifications of the CEA Agreement demonstrate a clear intent on behalf of the parties to identify both forklifts and skid-steers as pieces of construction equipment that are within the jurisdiction of operating engineers.

ii. 1954 Agreement

LIUNA 310 has recognized that, for nearly six decades, the operation of forklifts and skid-steers are properly within the jurisdiction of Local 18's membership. (*Donley's IV*: L18 Ex. 82.) While not determinative of the issue, the 1954 Agreement does bear significant weight in affirming Local 18's claim to forklifts and skid-steers insomuch as it clearly documents that other labor organizations representing members in the building construction industry – including LIUNA 310 – have historically recognized that the equipment at issue in this case properly fails within Local 18's craft jurisdiction.

iii.Letters of Assignment

Over the course of decades, scores of building construction employers within the CEA Agreement multiemployer bargaining unit have repeatedly recognized Local 18's claim to that forklift and skid-steer work. Specifically, hundreds of such contractors voluntarily elected to send a letter of assignment to Local 18 wherein they specifically agree to assign forklifts and or skid-steers to operating engineers. (*See* L18 PHB, Attachment C.) In sending these letters, each of these contractors patently recognizes and affirms Local 18's historic claim to that work.

Indeed, Charging Parties 21st Century and KMU issued letters of assignment in January and June of 2013, respectively, to Local 18, explicitly acknowledging that the operation of forklifts and skid-steers specifically falls within Local 18's craft jurisdiction, and would assign the operation, maintenance, repair, assembly, and disassembly of the same, as used in its projects on both a full-time and intermittent basis, to Local 18 members. (*Donley's III* Tr. 247, 303-304, L18 Exhs. 2-3.)

iv. Local 18 Member Testimony and Work Referrals

The strongest evidence of Local 18's historic performance of forklift and skid-steer work can be found in the testimony offered by those Local 18 members who have made their living performing that work. During the course of the *Donley's IV* hearing, dozens of Local 18 members testified as to their own personal experiences operating forklifts and skid-steers for building construction employers that were bound to the AGC Agreement and/or the CEA Agreement. In each instance, the witness offered credible and reliable testimony as to the name of their employer, the type of work performed, the location of the jobsite, and their understanding of which CBA governed their employment. (*Donley's IV*: Tr. 601-611, 818-30, 846-62, 917-30, 933-54, 990-1000, 1467-86, 1515-20, 1527-32, 1572-82, 1603-07, 1622-36, 1639-59, 1669-73, 1695-1707, 1729-1738.) Moreover, Local 18 has established by a preponderance of the evidence that the forklift and skid-steer work described by its membership was work performed under either or both the AGC Agreement or the CEA Agreement. (*See* L18 PHB, Attachment B.)

In particular, Local 18 members Jennifer Miller, Richard Pavelecky, Everee Springer, and Phillip Latessa all credibly testified that they had – for long periods of time and on many multiple occasions – performed forklift and/or skid-steer work for Charging Parties R.G. Smith

and Independence. (*Donley's IV*: Tr. 776-96, 867-914, 959-67, 1020-35.) Indeed, Ms. Miller had worked for R.G. Smith operating such equipment throughout 2013, Mr. Pavelecky had worked for Independence operating such equipment from 2010 through 2014, Ms. Springer had worked for Independence operating such equipment throughout 2014, and Mr. Latessa had worked for Independence for decades. (*Id*.) Similarly, Charging Parties KMU and 21st Century themselves *admitted* that they had consistently utilized operating engineers to operate forklifts and skid-steers. (*Donley's III*: Tr. TR 245-246, 264-265, 291.) Notably, ALJ Goldman considered this significant evidence of work for Charging Parties as nothing more as "isolated instances." (Dec., p. 15.)

Pointedly, Phillip Latessa testified as to how he lost years of faithful employment with Charging Party Independence as a direct result of the Charging Parties' attempts to utilize the present Section 10(k) hearings as a tool to wrest the work in dispute from Local 18 members. Mr. Latessa first became a member of Local 18 in 1979. (*Donley's IV*: Tr. 867.) He was also consistently employed by Independence as a "Steady-Eddie" between the 2011-2013 and frequently operated a skid-steer on multiple Independence projects including those that were subject to the underlying Section 10(k) proceedings. (*Id*. at Tr. 878.) For example, in 2012, Mr. Latessa used a skid-steer to move material over the course of four to six weeks at the Medical Mart project in Cleveland. (*Id*. at Tr. 870-72.) Once more, around the same time as the Medical Mart job, Mr. Latessa operated a skid steer for Independence, erecting the new hotel building in the East Bank of the Flats in Cleveland. (*Id*. at Tr. 876-78.) Additionally, between 2011 and 2013, Mr. Latessa operated a skid-steer for Independence doing similar work at the Horseshoe Casino in Cleveland. (*Id*. at Tr. 878.) After this job, around 2013, Mr. Latessa continued to be employed by Independence and operated a skid steer at the Cleveland Clinic job off of Route 303

for approximately one month doing the same work. (*Id*. at Tr. 878.) Also in 2013, Mr. Latessa operated a skid steer on the Collection Auto Group Acura Dealership job. (*Id*. at Tr. 910-14.) He testified that he ran a skid steer with tracks essentially every day he was on this job, approximately 2-3 hours per day. (*Id*.)

Indeed, there is no doubt that during his time of employment with Independence, Mr. Latessa made it known that he believed that operating engineers, and not laborers, should operate Independence's forklifts and skid-steers. (*Donley's IV*: Tr. 886-87.) Needless to say, his opinion was not shared by his employer. At one point his supervisor, Dave Bevan, approached him and said "People that talk don't work." (*Id*. at Tr. 881-83.) For obvious reasons, Mr. Latessa interpreted this as a threat. (*Id*.) Similarly after Kevin DiGeronimo specifically informed Mr. Latessa that he was no longer permitted to run skid-steers, Mr. Latessa replied that Local 18 has always operated skid-steers and the company might as well lay him off. Mr. DiGeronimo responded by telling his employee that "he knows how this will end." (*Id*. at Tr. 886-87.) The two men then shook hands and, after years of continuous service to Independence, Mr. Latessa sought gainful employment as an operating engineer elsewhere. (*Id*.)

In addition to the direct testimony from its members and the Charging Parties, Local 18 also offered reams of evidence regarding the Union's history of referring its members to operate forklifts and skid-steers for building construction employers bound to either or both the AGC Agreement or the CEA Agreement. Hundreds of building construction employers have repeatedly requested that Local 18 refer an operating engineer to operate forklifts and or skid-steers on building construction sites across the state of Ohio. (*See* L18 PHB, Attachment C.) More importantly, the vast majority of the contractors requesting such a referral have a history of being bound to either or both the AGC Agreement and/or the CEA Agreement. (*Id*.) As such,

Local 18's referral records offer further proof that a vast majority of building construction contractors bound to the AGC Agreement and/or the CEA Agreement have a history of assigning the operation of forklifts and skid-steer to operating engineers.

III. Law and Argument

A. Exception No. 1: Local 18 excepts to the ALJ's finding that Local 18's work preservation affirmative defense lacks merit. [ALJ Dec., pp. 11: 25-30, 13: 1-32, 14: 1-50, 15: 1-47, 16: 1-11.]

Exception No. 2: Local 18 excepts to the ALJ's finding that Local 18's work preservation affirmative defense must be rejected as a matter of Board precedent, including, but not limited to *Operating Engineers Local 18 (Donley's, Inc.)*, 363 NLRB No. 184 (2016). [ALJ Dec. pp. 11: 25-30, 14: 1-37, 15: 21-38, 16: 6-8, 16: 10-11.]

In the present matter, the ALJ relied upon *Operating Engineers Local 18 (Donley's, Inc.)*, 363 NLRB No. 184 (2016) ("*Donley's IV*") in finding that Local 18's affirmative defense of work preservation lacked merit. However, *Donley's IV* was wrongly decided and does not control the ALJ's Decision. Therein, the Board framed the work preservation inquiry as to whether Local 18 "was attempting to expand its work jurisdiction to employers whose [Local 18]-represented employees had never performed the disputed work." 363 NLRB at *4. In so doing, the Board cited *Laborers Local 265 (Henkels & McCoy)*, 360 NLRB No. 102 (2014) and *Stage Employees IATSE Local 39 (Shepard Exposition Services)*, 337 NLRB 721 (2002). However, *Laborers Local 265* and *IATSE Local 39* themselves rely upon a unmeasured and disjointed approach of the animating principles underlying work preservation in the context of Section 8(b)(4) litigation. By relying upon precedent that lacks the calculated approach necessary to correctly assess Local 18's work preservation argument, *Donley's IV* is fatally flawed. As such, the ALJ's reliance on the same is misplaced and the Board is required to exercise its

authority to overrule wrongly decided precedent. *See Waco, Inc.*, 273 NLRB 746, 749 (1984), fn. 14.

The error underlying both the ALJ's analysis in his rulings and the Board's analysis in *Donley's IV* centers on an fundamentally flawed analysis of the appropriate barging unit for determining Local 18's work preservation defense. At its most basic, the proper approach begins with the foundational principle of federal labor law that a union's right to "'preserv[e] for the contracting employees . . . work traditionally done by them'" is permitted by the National Labor Relations Act. *NLRB v. Internatl. Longshoremen's Assn.*, 447 U.S. 490, 504, 100 S.Ct. 2305, 65 L.Ed.2d 289 (1980), quoting *NLRB v. Pipefitters*, 429 U.S. 507, 517, 97 S.Ct. 891, 51 L.Ed.2d 1 (1977). In determining whether a union is properly attempting to preserve its work or "acquire work it never had," the Board must assess as a threshold issue "the traditional scope of the bargaining unit's work as evidenced by the contractual recognition clause [of the CBA] and the history of the parties' conduct under it." *E.g., Newspaper and Mail Deliverers (Hudson County News Co.)*, 298 NLRB 564, 566 (1990). If the union's conduct is to either preserve "bargaining unit work" or "recaptur[e] or reclaim[] for unit employees work which they previously performed or which otherwise constitutes 'fairly claimable' work," then such behavior does not violate the Act. *E.g., Teamsters Local 282 (D. Fortunato, Inc.)*, 197 NLRB 673, 677 (1972).

Beginning with a correct determination of the appropriate bargaining unit is especially significant when the work preservation defense is being applied to a multiemployer bargaining unit. This analysis requires "the necessity of determining the scope of the unit in question." *United Mine Workers (Dixie Mining Co.)*, 165 NLRB 467, 467 (1967). As the Board has emphasized, "[t]hat examination is essential in this kind of case." *Newspaper and Mail Deliverers*, 298 NLRB at 566. Indeed, where collective bargaining between the respondent union

and an employer trade association results in a single CBA whose unit scope is multiemployer in its breadth, such a unit "controls the determination" of whether the union's asserted work preservation behavior is lawful. *Id*. at 468. Critically, a multiemployer bargaining unit will include "the multiple employers who are signatory to the operative collective bargaining agreement," regardless of whether they are members of the employer trade association, as each such employer has agreed to become bound to the CBA's provisions by its very terms. *Am. Pres. Lines, Ltd. v. ILWU Local 60*, 611 Fed.Appx. 908, 911 (9th Cir. 2015). *Accord United Mine Workers (Coal Operators)*, 179 NLRB 479, 483-84 (1969) (a multiemployer bargaining unit includes both employees of "employers . . . [members of the] employer association and the employees of each independent signatory").

The foregoing approach has been explicitly adopted by the General Counsel itself. Specifically, as recently as 2014, the Division of Advice concluded, for the purposes of evaluating a work preservation defense, that the scope of a bargaining unit was multiemployer in nature, thereby "encompass[ing] all of the employers who are bound by that agreement." *ILA (Greenwich Terminals) Advice Memo*, Case No. 04-CC-123452, 2014 NLRB GCM LEXIS 27, *16 (July 15, 2014). This conclusion was predicated on the fact the CBA bound each signatory employer to the equivalent terms for any individuals it employed, thereby creating a single multiemployer bargaining unit. *Id*.

Once the appropriate bargaining unit has been established, the Board must evaluate whether, within that unit, the respondent union's "objective is to preserve bargaining work or to reacquire work previously performed or otherwise fairly claimable." *E.g., Newspaper and Mail Deliverers*, 298 NLRB at 566. "Fairly claimable work" is that which "is identical to or very

similar to that already performed by the bargaining unit and that bargaining unit members have the necessary skill and are otherwise able to perform." *Id*.

In practice, this means that the work at issue is fairly claimable by a union for any contractor utilizing employees within the multiemployer bargaining unit, as long as the union's members have "historically performed" such work for other such contractors signatory to the same multiemployer CBA. *Am. Pres. Lines, Ltd.*, 611 Fed.Appx. at 911. *Accord Ohio Valley Coal Co. v. Pleasant Ridge Synfuels*, 54 Fed.Appx. 610, 617 (6th Cir. 2002). The General Counsel has likewise agreed, concluding that "[w]here the work has been customarily and regularly performed by employees in a multi-employer bargaining unit, it is fairly claimable unit work regardless of whether employees of individual employers in the unit performed the disputed work." *ILA (Greenwich Terminals) Advice Memo*, 2014 NLRB GCM LEXIS 27 at *16. Such a conclusion rings true for all stripes of Section 8(b)(4) actions, regardless of whether they involve allegations of Subsection (B) or (D) violations. *See ILWU Local 4 (Kinder Morgan Terminals)*, Case No. 19-CC-092816, 2014 NLRB LEXIS 632, *46-47, 62-63 (Aug. 13, 2014) (respondent union's work preservation defense prevailed in light of Section 8(b)(4)(D) allegations where the work at issue was fairly claimable by its members within the appropriate multiemployer bargaining unit).

In sharp contrast, the Board's approach to work preservation in *Donley's IV* relies on a long line of inapposite precedent concerning jurisdictional disputes that largely involve single employers and single jobsites. *Laborers Local 265 (Henkels & McCoy)*, 360 NLRB No. 102 (2014), the first case relied upon by *Donley's IV*, utilized an impermissibly narrow view that an asserted work preservation defense in a Section 10(k) proceeding must demonstrate that Local 18 members have previously performed the work in dispute for the charging party employer and

that it is not attempting to expand its work jurisdiction. *Id*. at *4-5. *See also Stage Employees IATSE Local 39 (Shepard Exposition Servs.),* 337 NLRB 721, 723 (2002) (the other decision upon which *Donley's IV* relied in rejecting Local 18's work preservation argument). This rule in fact was based upon *Teamsters Local 174 (Airborne Express),* which stated that a work preservation argument is unsuccessful where "the union's objective was acquisition of work not historically performed by the claiming group of employees." 340 NLRB 137, 139 (2003). The ALJ's recitation of *Chicago Dist. Council of Carpenters (Prate Installations, Inc.),* 341 NLRB 543 (2004) is similarly unavailing. This case did not involve a work preservation claim in the context of a multiemployer bargaining unit. Rather, it involved a single employer, Prate Installations. As such, the only bargaining unit against which the union's work preservation claim was measured was that of the single employer. Much like *Donley's IV* and earlier Section 10(k) jurisprudence, the Board made no threshold examination as to the scope of the applicable bargaining unit. Additionally, *Chicago Dist. Council of Carpenters* is distinguishable because the respondent union had a long history of openly acquiescing to the employer's assignment of disputed work to other employees. Indeed, in that case, there was specific evidence that the Carpenters had long acquiesced to the employer's decision to assign the disputed shingling work "to crews of Roofers-represented employees, to crews of Carpenters-represented employees, and to composite crews." *Id.* at 545.

Here, there is not one scintilla of evidence that Local 18 has ever acquiesced to an employer's assignment of bargaining unit work to someone other than an operating engineer. Moreover, the Board precedent utilized to determine the viability of Local 18's work preservation affirmative defense is woefully inadequate in the realm of the present jurisdictional disputes involving a multi-employer bargaining unit. Indeed, the Board and the General Counsel

both ignore the robust body of law that first looks to the scope of the applicable bargaining unit to evaluate the merits of work preservation in the context of Section 8(b)(4) as a whole. It is this more thorough, equitable, and *correct* approach that the Board in *Donley's IV* should have utilized. Under this proper rubric, to which the ALJ should have adhered, there is no doubt that by a preponderance of the evidence, Local 18's work preservation defense carries the day.

B. Exception No. 3: Local 18 excepts to the ALJ's finding that Local 18's maintenance of grievances under the work preservation clause contained within the 2012-2015 and 2015-2019 CEA Agreement violate Section 8(b)(4)(D) of the National Labor Relations Act. [ALJ Dec., p. 11: 13-23.]

   Exception No. 4: Local 18 excepts to the ALJ's Conclusion of Law No. 3. [ALJ Dec., p. 16: 25-30.]

By ignoring *Donley's IV* and its predecessors, and instead relying upon proper precedent, ALJ Goldman would have correctly concluded that Local 18's maintenance of its work preservation grievances brought pursuant to the 2012-2015 and 2015-2019 CEA Agreement serve as a complete defense against Section 8(b)(4)(D) allegations. The proper analysis first requires "the necessity of determining the scope of the unit in question." *United Mine Workers*, 165 NLRB at 467 (1967). Through this "essential" review, *see Newspaper and Mail Deliverers*, 298 NLRB at 566, there is no question that the CEA Agreement's contractual recognition clause specifically identifies the appropriate unit as being a multi-employer unit comprised of any and all contractors that elect to be bound to the Agreement's terms.

Specifically, the CEA Agreement provides that covered employers include "[a]ll members of the Association for whom it holds bargaining rights and any person, firm, or corporation who, as an Employer, becomes signatory to this Agreement, shall be bound by all of its terms and conditions, as well as any future amendments which may be negotiated between the Association, and the Union[.]" (*Donley's IV*: GC Ex. 5, Article II.) Moreover, the CEA

recognizes Local 18 as the "exclusive bargaining agent for all Operating Engineers" within the Agreement's geographical confines. (*Id.*) In sum, the plain language of the CEA Agreement makes clear that the bargaining unit is not limited to individual employers, but ensures that Local 18 is the exclusive bargaining agent for *all* of its members who are employed by contractors signatory to the Agreement, *regardless* of whether they are CEA members or mere signatories. Accordingly, there is no question that the scope of the bargaining unit at issue includes the entire multiemployer unit of contractors bound to the CEA Agreement. *See, e.g., United Mine Workers*, 179 NLRB at 483-84. This is the very type of language that caused the General Counsel to conclude in 2014 that the scope of a CBA, for the purposes of assessing a work preservation defense, was multiemployer in scope. *ILA (Greenwich Terminals) Advice Memo*, 2014 NLRB GCM LEXIS 27 at *16.

Under this rubric, the proper scope of the bargaining unit for assessing Local 18's work preservation defense is as follows: no fewer than 51 different building construction employers were bound to the CEA Agreement set to expire in 2015 (*Donley's IV*: L18 Ex. 171 A-C); no fewer than 89 different building construction employers were bound to the CEA Agreement that expired in 2012 (*Donley's IV*: L18 Ex. 171D-F); and no fewer than 30 different building construction employers were bound to the CEA Agreement that expired in 2009 (*Donley's IV*: L18 Ex. 171G-H.) In contrast, ALJ Goldman improperly evaluated Local 18's work preservation defense by only looking to the work practices of the individual Charging Parties, not the entire multiemployer bargaining unit to which they belonged.

With this threshold matter established, ALJ Goldman would have instead found that forklift and skid-steer work is fairly claimable by Local 18 members. There is no need to determine whether the individual Charging Parties had historically employed operating engineers

to perform forklift or skid-steer work (although the record evidence establishes that they did). Rather, viewed as a whole, a preponderance of the evidence in this case demonstrates that Local 18's members have historically been employed throughout the CEA multiemployer bargaining unit to operate both forklifts and skid-steers. This showing sufficiently establishes that such work is fairly claimable by Local 18. *Am. Pres. Lines, Ltd.*, 611 Fed.Appx. at 911; *Ohio Valley Coal Co.*, 54 Fed.Appx. at 617; *ILA (Greenwich Terminals) Advice Memo*, 2014 NLRB GCM LEXIS 27 at *16; *ILWU Local 4 (Kinder Morgan Terminals)*, 2014 NLRB LEXIS 632 at *46-47, 62-63. Indeed, decades of collective bargaining, scores of letters of assignment, years of referrals, and the unchallenged testimony of a denizen of Union members all establish the immutable fact that Local 18 has a long and proud history of operating forklifts and skid-steers in the building and construction industry. At bottom, had the ALJ considered any of the foregoing information, a preponderance of the evidence would have established that forklift and skid-steer work is fairly claimable by Local 18 throughout the CEA Agreement multiemployer bargaining unit as whole, *as well as* specifically applied to Charging Parties R.G. Smith, Independence, KMU, and 21st Century.

C. Exception No. 5: Local 18 excepts to the ALJ's finding that *Laborers Local 310 (KMU Trucking & Excavating)*, 361 NLRB No. 37 (2014) (*Donley's III*) and *Operating Engineers Local 18 (Nerone & Sons)*, 363 NLRB No. 19 (2015) (*Nerone*) have "for all practical purposes" determined the disposition of the present matter. [ALJ Dec., p. 11: 38-50.]

As the Supreme Court has enunciated, "[t]he Board's attention in the § 10(k) proceeding is not directed to ascertaining whether there is substantial evidence to show that a union has engaged in forbidden conduct with a forbidden objective. Those inquiries are left for the § 8(b)(4)(D) proceeding." *ITT v. Electrical Workers Local 134*, 419 U.S. 428, 445, 95 S.Ct. 600, 42 L.Ed.2d 558 (1975). To this point, the Board is only required to determine whether there is

"reasonable cause to believe that § 8(b)(4)(D) has been violated." *Id*. at fn. 16. By contrast, in the subsequent ULP hearing, "a union can be found guilty of committing an unfair labor practice only if a violation is established by a preponderance of the evidence." *Id*.

Under this standard, the ALJ is required to make certain credibility assessments that were not made in the underlying Section 10(k) proceedings. *Elec. Workers Union (Western Elec. Co.)*, 141 NLRB 888, 893 (1963). As established in Section B of the instant brief, ALJ Goldman was presented with conflicting testimony regarding whether or not Local 18 has a history of performing the work in dispute for Charging Parties. The Section 10(k) hearings in *Donley's III* and *Nerone* were, however, investigatory in nature; thus, the credibility of the evidence regarding the issue of historic performance of the disputed was not weighed nor was any conflicting testimony resolved. Because the Section 10(k) evidentiary standards failed to provide Local 18 with opportunities to support or attack the credibility of witnesses and evidence, it was effectively precluded from establishing affirmative defenses of work preservation or collusion. Moreover, given that there was no actual hearing in the present matter, the ALJ was unable to accord any weight or credibility to the evidence that was incorporated into the record. While this evidence may have been sufficiently admissible, without an actual hearing, the ALJ lacks a basis upon which to appropriately determine the evidence's strength and materiality.

Left unchecked, these procedural defects implicate the loss of Local 18's due process rights. *See Cooper v. Salazar*, 196 F.3d 809, 815 (7th Cir.1999) (due process requires the opportunity to confront and cross-examine witnesses during final assessments in an adjudicatory hearing by an administrative law judge). Such a deprivation of meaningful due process would be all the more egregious given the fact that the "determination of a work preservation object" is "not something casually made, but rather," demands "careful inquiry." *Carpenters Local 112*

(Summit Valley Indus.), 217 NLRB 902, 914 (1975), *enfd., sub nom. Chamber of Commerce of the United States of America v. NLRB*, 574 F.2d 457 (9th Cir.1978). Although somewhat time consuming, the dual hearing approach by the Board is a logical check against the deprivation of due process given that in the Section 10(b) hearing, the "substantive matter . . . is whether the [respondent has] engaged in unfair labor practices within the meaning of Section 8(b)(4)(D)" *Iron Workers Local 595*, 112 NLRB at 813-14, while on the other hand the Section 10(k) decision is much like an "advisory opinion." *ITT*, 419 U.S. at 445. Indeed, it is only through the use of the adjudicatory mechanisms offered by a Section 8(b)(4)(D) hearing before an ALJ that Local 18's due process rights as it pertains to its affirmative defenses are vindicated.

Simply put, the Board's Section 10(k) determinations have no utility in resolving the present Section 8(b)(4)(D) charges. Indeed, while a review of an underlying Section 10(k) decision may capture "undisputed facts," the "ultimate, sufficiency-of-evidence issue" is the sole province of the ALJ during the adjudicatory stage of this Section 10(b) hearing. *Pipefitters Local 290 (Streimer Sheet Metal Works, Inc.)*, 323 NLRB 1101, 1102 (1997). Moreover, because the Board never determined the proper scope of the applicable bargaining unit in *Donley's I* through *IV*, as well as *Nerone*, its determinations in those cases regarding the validity of Local 18's work preservation defense are fatally flawed. Given these substantive and procedural deficiencies, the underlying Section 10(k) proceedings could not bind or limit the ability of ALJ Goldman to conduct a ULP hearing to determine whether Local 18 has violated Section 8(b)(4)(d) of the Act.

D. Exception No. 6: Local 18 excepts to the ALJ's finding that Local 18 is seeking to contest the underlying Board awards of work in *Donley's III* and *Nerone*. [ALJ Dec., p. 12: 17-18.]

Exception No. 7: Local 18 excepts to the ALJ's finding that Local 18's affirmative defense of collusion is a threshold issue not subject to relitigation in the present matter. [ALJ Dec., pp., 11: 25-30, 12: 26-30, 16: 10-11.]

Exception No. 8: Local 18 excepts to the ALJ's finding that Local 18's affirmative defense of collusion is a threshold issue not subject to relitigation in the present matter. [ALJ Ord., pp. 6.]

Exception No. 9: Local 18 excepts to the ALJ's ruling whereby it denies Local 18's Motion to Reopen the Record on the basis that Local 18's proffered evidence lacks sufficient weight and character. [ALJ Dec., pp. 12-13: fn. 4.]

Exception No. 10: Local 18 excepts to the ALJ's implicit finding that Local 18's work preservation affirmative defense is a threshold issue not subject to relitigation in the present matter. [ALJ Dec., pp. 13: 5-32, 14: 40-43, 16: 10-11.]

Exception No. 11: Local 18 excepts to the ALJ's finding that Local 18's work preservation affirmative defense is not an element of a Section 8(b)(4)(D) claim, and is therefore a threshold issue not subject to relitigation in the present matter. [ALJ Ord., pp. 6-7.]

In the present matter, Local 18 has raised the issues of collusion and work preservation between the CEA and LIUNA 310 as affirmative defenses to the allegation that it violated Section 8(b)(4)(D) of the Act by maintaining certain grievances against Charging Parties. As explained in Section C of the present brief, the Board's treatment of these defenses in the underlying Section 10(k) proceedings was insufficient to establish their viability. Yet ALJ Goldman has erroneously viewed these matters as part and parcel of the Board's award of work, and therefore concludes that Local 18 is attempting to contest the same. This finding departs from basic Board precedent.

While the Board has noted that certain threshold issues litigated during a Section 10(k) proceeding may not be relitigated in a subsequent 8(b)(4)(D) hearing, *see ILWU Local 6 (Golden Grain Macaroni Co.)*, 289 NLRB 1, 2 (1988), fn. 4, it has likewise held that the latter hearing is

appropriate when, *inter alia*, the respondent union "denies the existence of an element of the 8(b)(4)(D) violation, *either* directly *or* by raising an affirmative defense." *Id.* In fact, the Board held in *ILWU Local 6* that the respondent union was entitled to raise the affirmative defense of work preservation, since it sufficed as a denial of the 8(b)(4)(D) allegation. *Id.* In addition to ignoring the plainly stated rule in *ILWU Local 6*, ALJ Goldman erroneously relies upon *ILA Local 1332 (Philadelphia Marine Trade Assn.),* 219 NLRB 1229 (1975) for the proposition that the Board's determination of a work preservation argument is binding upon the ALJ in a subsequent Section 8(b)(4)(D) proceeding. (Dec., p. 13; Ord., p. 7.) However, that case predates *ILWU Local 6,* and utilizes the discarded principle that a subsequent ULP proceeding "is based entirely on the record evidence introduced in the 10(k) proceeding." *ILA Local 1332,* 219 NLRB at 1229, fn. 1. Yet, under current Board jurisprudence, Local 18's work preservation affirmative defense "is a mixed question of fact and law" and may be relitigated during the subsequent ULP proceedings. *ILWU Local 6* at 2. Moreover, in *ILA Local 1332*, the Board subsequently found that a work preservation argument could not subsequently be raised "[u]pon the basis of the undisputed facts the [Board] decided in the 10(k) proceeding[.]" *Id*. Critically, unlike here, the respondent *did not dispute* that it had an unlawful object through proscribed behavior. *Id*. As such, *ILA Local 1332* is entirely distinguishable and has no bearing on the ALJ's responsibility to consider Local 18's affirmative defenses. In contrast to the ALJ's view, *ILA Local 1332* has been effectively neutered post-*ILWU Local 6* – a thorough review reveals that no other Board or published ALJ decision has ever cited to it, other than to the one to which Local 18 is currently excepting.

Similarly, while the Board has clarified that a threshold matter in a Section 10(k) action is concerned with "whether the proceeding is properly before the Board for disposition, not

whether a violation of Sec. 8(b)(4)(D) has been committed," *Ironworkers Dist. Council (Hoffman Constr. Co.),* 293 NLRB 570, 570 (1989), fn. 1, a respondent in a ULP hearing is entitled to raise the affirmative defense of collusion, even if it does not speak to the respondent's own actions. *See NLRB v. Teamsters Local 126*, 435 F.2d 288, 291 (7th Cir. 1970), *enfg.* 175 NLRB 630 (1969). In fact, given the stark evidentiary differences between Section 10(k) and 8(b)(4)(D) hearings, a prohibition on Local 18's right to raise collusion and work preservation during the latter proceedings is a flagrant violation of Local 18's due process rights.

Specifically, limiting the litigation of collusion to Section 10(k) proceedings contrary to the purposes of the Act and inherently inequitable. These hearings, by definition, merely "interpose[] an intermediate formal step between the completion of investigation of a charge and the issuance of a complaint based thereon." *Iron Workers Local 595 (Bechtel Corp.),* 112 NLRB 812, 813 (1955). Accordingly, the collusion determinations in *Donley's III* and *Nerone* should not be binding upon the ALJ because those determinations – like all Section 10(k) decisions – were "reached under a different evidentiary standard" than that which is applicable to the resolution of issues associated with affirmative defenses including the defense of collusion. *Pipefitters Local 290*, 323 NLRB at 1101, fn. 3. Indeed, during the underlying Section 10(k) proceedings, the Board does not "conclusively resolve conflicts in testimony" nor is it permitted to do so. *E.g., Elec. Workers Union*, 141 NLRB at 893. Rather, the Board is only required to find reasonable cause to believe that Section 8(b)(4)(D) has been violated. *Id.* True adjudication of a Section 8(b)(4)(D) allegation and any affirmative defenses offered thereto only occurs when a complaint issues and a hearing under Section 10(b) involving a full factual and legal adjudication by an ALJ is conducted. *Id*. There, the ALJ is charged with determining whether a preponderance of all the evidence supports a finding that the respondent has violated Section

8(b)(4)(D) of the Act, regardless of whether factual issues concerning such a violation were already litigated in the underlying 10(k) matter. *E.g., Teamsters Local 216 (Granite Rock Co.),* 296 NLRB 250, 250 (1989), *enfd.* 940 F.2d 667 (9th Cir.1991). This determination requires an "independent evaluation of the evidence" that affords no deference to the underlying Section 10(k) decision or record. *See Plasterers Local Union No. 30*, 164 NLRB 945, 947 (1967).

Given these critical procedural differences, Section 10(k) proceedings do not contain the appropriate adjudicatory mechanisms or standards for determining a defense of collusion. Indeed, an affirmative defense is "defined as '[a] defendant's assertion raising new facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all allegations in the complaint are true.'" *E.g., Saks v. Franklin Covey Co.*, 316 F.3d 337, 350 (2nd Cir.2003), quoting *Black's Law Dictionary* 430 (7th ed. 1999). Given that affirmative defenses in the context of ULP hearings must be established "by a preponderance of the credible evidence," *Murco, Inc.*, 266 NLRB 1175, 1175 (1983), an ALJ must make certain credibility assessments that were not formulated in the underlying Section 10(k) proceedings. *Elec. Workers Union*, 141 NLRB at 893. Affirmative defenses often, if not always, require that conflicts in testimony and contested facts be resolved. This is equally true in the context of Section 8(b)(4)(D) hearings where the respondent offers an affirmative defense to rebut the General Counsel's *prima facie* case. In such instances, the ALJ should be charged with assessing the entire record to determine whether the affirmative defense or the prima facie case has been established. ALJ Goldman's reliance on precedent holding otherwise in both his Decision and Amended Order is therefore erroneous as a matter of law.

Had ALJ Goldman considered Local 18's affirmative defense of collusion, he would have determined that the record is replete with evidence that the CEA and LIUNA 310 actively

colluded to jumpstart the sham jurisdictional disputes resulting in *Donley's I*, *Donley's II*, *Donley's III*, and *Nerone*. To begin with, it is undisputable that as early as April of 2012, the CEA elected to simultaneously negotiated with both Local 18 and LIUNA 310 to reach two different agreements that each covered the same work. When pressed as to why he would chose such a course of action without first removing the equipment from Local 18's agreement or excepting that equipment from the work preservations provisions contained within Paragraph 21(E) of the CEA Agreement, Mr. Linville, the CEA's Vice-President, testified that he did so because he knew Local 18 would have "a hard time enforcing" its contract. (*Donley's I*: Tr. 306.)

It is equally clear that this meant that CEA contractors would attempt to couch Local 18's work preservation grievances as a jurisdictional dispute in order to have it resolved before the Board pursuant to Section 10(k). To this end, in October of 2012, after Local 18 filed its grievances addressed in *Donley's II*, the CEA preemptively warned LIUNA 310 of an "area-wide campaign" as an assault by Local 18 to claim forklift and skid steer work from LIUNA 310 and other unions. (*Donley's IV*: Tr. 256-260, L18 Ex. 72.) In so doing, the CEA was sure to receive the response they needed to invoke the Board's jurisdiction under Section 10(k): a threat to strike.

Moreover, after the hearing in the case *sub judice* had concluded, Local 18 came across evidence "newly discovered and previously unavailable at the time of the hearing." *E.g., Planned Building Servs., Inc.*, 347 NLRB 670, 671 (2006), fn. 4. Specifically, a CEA officer, Don Dreier, stated that Local 18's representational picket at the Goodyear jobsite in 2011 set the tone for the CEA's subsequent negotiations with LIUNA 310. As such, Local 18 reasonably believed the fruits of those negotiations resulted in a CBA that would permit CEA employers to jumpstart Section 10(k) proceedings by filing ULP charges, as retaliation for Local 18's picket. While

Local 18 attempted to proffer this evidence in the form of a Motion to Reopen the Record, ALJ Goldman erroneously denied the same. He did by incorrectly finding that collusion is a threshold issue in a Section 10(k) proceeding, and therefore not subject to relitigation in subsequent Section 8(b)(4)(D) actions.

E. Exception No. 12: Local 18 excepts to the ALJ's Amended Order granting Charging Parties' Motion in Limine and holding that the following categories of proffered evidence by Local 18 are irrelevant because they are part and parcel of Local 18's attempt to relitigate the affirmative defenses of collusion and work preservation:

i. Evidence related to work performed under the National Maintenance Agreement, Association of General Contractors Agreement, or Highway Heavy Agreement;
ii. Evidence related to work performed outside the geographic jurisdiction of the Section 10(k) awards in Donley's III and Nerone (i.e., the overlap between the jurisdictions of Local 18 and Party-in-Interest Laborers' Local 310);
iii. Evidence related to operating engineers' training on forklifts and/or skid-steers;
iv. Evidence concerning the decisions, discussions, litigation, meetings, or determinations of the Operating Engineers Health and Welfare and Pension Funds;
v. Evidence related to work referral records that do not relate directly to the Charging Parties' work on a job performed under the CEA Building Construction Agreement or were not issued for work to be performed within the geographic jurisdiction of the Section 10(k) awards in Donley's III and Nerone;
vi. Evidence relating to any agreement purportedly entered into between the International Union of Operating Engineers and the Laborers' International Union of North America in 1954 related to the assignment of forklift and/or skid-steer work;
vii. Evidence relating to the bargaining history between the CEA and, on the one hand, Local 18 and, on the other Laborers' Local 310, concerning the assignment of forklift and skid-steer work;
viii. Evidence directed to the issue of collusion;
ix. Evidence directed to the work preservation affirmative defense; and
x. Evidence related to forklift and skid-steer work performed by operating engineers by Charging Party employers. [ALJ Ord., p. 8.]

As established in Sections C and D of this brief, the affirmative defenses of collusion and work preservation are not threshold matters in underlying Section 10(k) proceedings. As such, they may be fully relitigated in subsequent Section 8(b)(4)(D) proceedings, especially given the gulf in evidentiary standards and accompanying analysis between those two categories of

matters. By holding otherwise, ALJ Goldman erred when he granted Charging Parties' Motion in Limine, finding that ten categories of proffered evidence by Local 18 would be irrelevant solely because they pertained to work preservation and collusion. By refusing to hear such evidence, given that it pertains to affirmative defenses of mixed law and fact, the ALJ's conduct "precludes a fair determination" of the instant case. *Dayton Power and Light*, 267 NLRB 202, 202 (1983).

F. Exception No. 13: Local 18 excepts to the ALJ's finding that Local 18's maintenance of grievances under the work preservation clause contained within the 2012-2015 and 2015-2019 CEA Agreement are susceptible to resolution under Section 8(b)(4)(D) of the National Labor Relations Act as opposed to Section 8(e). [ALJ Dec., p. 11: 13-23.]

Collective bargaining is an effort to erect a system of industrial self-government utilizing agreed-upon rules of law which seeks to avoid leaving "matters subject to a temporary resolution dependent solely upon the relative strength, at any given moment, of the contending forces." *Warrior & Gulf*, 363 U.S. at 580-581. As such, it has long been federal policy to promote industrial stabilization through the voluntary use of the collective bargaining process. National labor policy encourages the grievance-arbitration procedure as the preferred method of resolving labor-management disputes arising under collective bargaining agreements. *Id*. Accord *ILWU Local 7 (Georgia-Pacific Corp.)*, 291 NLRB 89, 93 (1988). Congressional support of this policy is clearly set forth in Section 203(d) of the Act, which states: "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."

In *AT&T Technologies v. Communications Workers*, the Supreme Court reaffirmed the preferred status of labor arbitration stating that contract provisions that call for arbitration of labor disputes "have served the industrial relations community well, and have led to continued

reliance on arbitration, rather than strikes or lockouts, as the preferred method of resolving disputes, arising during the term of a collective-bargaining agreement." 475 U.S. 643, 648, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986). *See also United Paperworkers Internatl. Union v. Misco, Inc.*, 484 U.S. 29, 36-37, 108 S.Ct. 364, 89 L.Ed.2d 286 (1987). With this policy in mind, the Board has determined that it is oftentimes prudent to refrain from exercising its authority to adjudicate alleged unfair labor practices in order to facilitate private dispute resolution under the grievance-arbitration process. *E.g., United Technologies Corp.*, 268 NLRB 557 (1984); *Collyer Insulated Wire*, 192 NLRB 837 (1971); *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955). To this end, the Board has adopted the Supreme Court's premise in *Carey v. Westinghouse Corp.* that the grievance and arbitration process has a major role to play in settling jurisdictional disputes. Specifically, the Board stated that:

> "The [Supreme] Court held in Carey that prior to a Board 10(k) award, a union involved in a jurisdictional dispute may file a contractual grievance, pursue it to arbitration, and seek to enforce an arbitration award under Section 301. The Court stated that the 'underlying objective of the national labor laws is to promote collective bargaining agreements and to help give substance to such agreements through the arbitration process'; that '[g]rievance arbitration is [a common] method of settling disputes over work assignments'; and that '[s]ince § 10(k) not only tolerates but actively encourages voluntary settlements of work assignment controversies between unions, we conclude that grievance procedures pursued to arbitration further the policies of the Act.'"

ILWU Local 7, 291 NLRB at 93, quoting *Carey v. Westinghouse Corp.*, 375 U.S. 261, 265-66, 84 S.Ct. 401, 11 L.Ed.2d 320 (1964). The Board's position in *Georgia-Pacific* is not only in accordance with federal policy embracing the role that arbitration plays in resolving disputes arising under labor agreements, but is also consonant with the legislative history of Section 10(k) itself.

In discussing the merits and liabilities of the then-proposed LMRA Bill S.1126, Senator Thomas stated that "[w]e are confident that the mere threat of governmental action [via Board

action under Section 10(k)] will have a beneficial effect in stimulating labor organizations to set up appropriate machinery for the settlement of such [jurisdictional] controversies within their own ranks, where they should properly be settled." S. Min. Rep. No. 105., 80th Cong., 1st Sess., I Leg. Hist. 480-481 (LMRA 1947). Similarly, Senator Taft, co-sponsor of the LMRA, stated that the "desired objectives" of enacting, *inter alia*, Section 10(k) of the LMRA were "prompt elimination of the obstructions to the free flow of commerce and encouragement of the practice and procedure of free and private collective bargaining." S. Rep. No. 245, 80th Cong., 1st Sess., I Legislative History of the Labor Management Relations Act ("Leg. Hist.") 414 (LMRA 1947). In this manner, the Board's policy for promoting valid work preservation clauses because they are key components to maintaining "industrial peace," *Machinists District 190 (SSA Terminal LLC)*, 344 NLRB 1018, 1020 (2005), *enfd.* 253 Fed. Appx. 625 (9th Cir.2007), thus dovetails with the Congressional policy that favors arbitration rather than Board resolution of labor disputes in cases that technically appear to be Section 10(k) disputes, but are in fact work preservation disputes at heart. *See, e.g., USCP-WESCO, Inc. v. NLRB*, 827 F.2d 581, 586 (9th Cir.1987).

For its part, arbitral jurisprudence has also long recognized the utility of contractually negotiated work preservation clauses. Indeed, it is now a fundamental principle in arbitration that "[p]reservation of work contractually entitled to members of a bargaining unit is central to most collective bargaining agreements." *E.g., Franklin Cty. Bd.*, 127 LA 1537, 1540 (Van Kalker, 2010); *Rolls-Royce Energy Sys.*, 128 LA 1089, 1091 (Van Kalker, 2011). That is, "[t]he protection and preservation of the unit work is the fundamental economic benefit obtained by the Union in collective bargaining." *City of Hamilton*, 123 LA 932, 935 (Goldberg, 2006). As Arbitrator Wallen artfully put it:

> Job security is an inherent element of the labor contract, a part of its very being. If wages is the heart of the labor agreement, job security may be considered its soul . . . . The transfer of work customarily performed by employees in the bargaining unit must therefore be regarded as an attack on the job security of the employees whom the agreement covers and therefore as one of the contract's basic purposes.

New Britain Mach. Co., 8 LA 720, 722 (Wallen, 1947). As such, a work preservation clause "guarantees to the union bargaining unit work for the duration of the contract term." *Brookfield-LaGrange Park Bd. of Edn.*, 93 LA 353, 357 (Nathan, 1989).

Where the language of the work preservation clause indicates that it seeks the preservation of work that is traditionally performed by the union's members and within their "legitimate expectation[s]", the work preservation clause is justified even if there is not an actual threat of job loss. *See Painters Dist. Council 51*, 321 NLRB at 165-166. *Accord United Mine Workers (Dixie Mining Co.)*, 188 NLRB 753, 754 (1971) (Board has found a valid work preservation clause where the union attempts to protect and preserve unit jobs by imposing a financial penalty on the employer, thus removing economic incentive to divert work to a cheaper workforce). More specifically, when a work preservation clause defines work to be performed by the unit employees, does not impose legally cognizable obligations on third parties, does not regulate the labor policies of third parties or non-unit employees, and is only used in the context of disputes between the contracting employer and union, the "clause represents a genuine effort to preserve the work of employees in the contract unit" represented by the union. *Plumbers & Pipefitters Union (American Boiler Mfrs. Assn.)*, 154 NLRB 285, 295 (1965) (Member Brown, dissenting).

Here, both the CEA Agreement and the AGC Agreement clearly identify that the type of work covered therein and specifically include the operation of both forklifts and skid-steers. Both agreements also specifically provide for an economic penalty and not a reassignment of

work should a violation of the work preservation clause occur. Indeed, in maintaining its work preservation grievances, Local 18's conduct adheres to that required by the Board to establish a valid work preservation objective that would supersede any attempts to subordinate such an objective to Section 10(k) proceedings. Specifically, Local 18 has pursued its contractual claims regarding via grievances and has not demanded the work while processing these grievances nor at any other time during the performance of the work at the relevant jobsites. *See Teamsters Local 107 (Reber-Friel Co.)*, 336 NLRB 518, 520-521 (2001). Rather, Local 18 is only seeking monetary damages by way of its applicable work preservation clauses. The Union's long history of peaceably doing so is evidenced by its history of settling work preservation grievances through the payment of lost wages and charitable donations with employers who belong to the CEA and AGC multiemployer bargaining unit: Rudolph Libbe Co., G&L Corp., Bogner Construction Co., Mr. Excavator, Inc., Phoenix Cement, Inc., Mosser Construction, Site-Tech, Inc., Industrial Power Systems, Sofco Erectors, Inc., B&B Wrecking, and Charging Party R.G.

Without doubt, the General Counsel and the Charging Parties will assert that the Board has previously held that when a union makes a work preservation claim or files a so-called pay-in-lieu grievance it is in effect asserting a claim for work in dispute and thus triggers a jurisdictional dispute cognizable under Section 10(k). *See, e.g., Laborers Local 113 (Super Excavators Inc.)*, 327 NLRB 113, 114 (1998). These cases, however, are distinguishable from the facts and circumstances in the present matter insomuch as none of the prior cases that addressed so-called pay-in-lieu grievances involved a valid and legitimate work preservation clause with language as explicit as that which is contained in in the CEA Agreement and the AGC Agreement. Moreover, none of these so called pay-in-lieu cases concerned unions that had Local 18's history of peaceably resolving disputes concerning the assignment of work through

the use of grievance and arbitration procedures. Rather, the evidence in each of these so-called pay-in-lieu cases demonstrated that the union pursuing the grievance was only concerned with forcing a change in the assignment of work.

Considering these facts, especially given that Local 18 has historically performed the work at issue, a finding that Local 18's grievances constitute a coercive means of enforcing a claim to disputed work would be contrary to the basic principles and purpose of the Act which protect the rights of parties to collectively bargain and promote the use of arbitration proceedings to resolve disputes between contracting parties. Overall, "preservation of unit work is a legitimate union goal . . . and its attainment through financial penalties when the agreement [regarding work preservation] is violated is equally valid . . ." *Borden, Inc.*, 196 NLRB 1170, 1173 (1972). The Board policy behind "respect[ing]" and "protect[ing]" genuine work preservation clauses is that they "'help maintain industrial peace, and the Board should not assert its jurisdiction in a manner which ensures that legitimate work preservation provisions would become unenforceable.'" *Machinists District 190*, 344 NLRB at 1020. This especially true when, as here, the General Counsel has failed to allege or charge that the maintenance of Local 18's work preservation clause constitutes a violation of Section 8(e) of the Act. Indeed, absent such an allegation, the Board has no basis for finding that Local 18's contractually mandated work preservation grievances constitute anything other than the lawful result of free and fair collective bargaining.

IV. Conclusion

The preponderance of the credible evidence indicates that Local 18's enforcement of its work preservation rights is not within the aegis of a Section 8(b)(4)(D) violation. As such, Local

18 excepts to the ALJ's Remedy and Order (ALJ Dec., pp. 16: 34-46, 17: 1-40, 18: 1-33), and the ALJ's Decision finding that Local 18 has violated the Act must be abrogated in its entirety.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing was electronically filed with the National Labor Relations Board, Office of the Executive Secretary, and served via email to the following on this 12th day of September, 2016:

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